



**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BOOTHWYN FIRE COMPANY NO. 1,	:	Third Circuit
	:	Case No. <u>16-2607</u>
Petitioner,	:	
	:	
v.	:	
	:	
NATIONAL LABOR RELATIONS BOARD,	:	
	:	
Respondent.	:	

PETITION FOR REVIEW

Petitioner Boothwyn Fire Company No. 1 hereby petitions this Honorable Court for review of the Order of the National Labor Relations Board ("Board") in NLRB Case Nos. 04-CA-133498 and 04-CA-140365 finding that Petitioner violated Section 8 (a) (1) of the National Labor Relations Act. The Board's order was entered on May 16, 2016 and is reported at 363 NLRB 191. A copy of the Board's Decision and Order is attached as Exhibit A.

Respectfully submitted,

HOLSTEN & ASSOCIATES

By: _____

M.A. Raith

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Attorney for Petitioner
Boothwyn Fire Company No. 1

Dated: May 25, 2016

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BOOTHWYN FIRE COMPANY NO. 1,	:	
	:	
Petitioner,	:	
	:	
v.	:	
	:	
NATIONAL LABOR RELATIONS BOARD,	:	
	:	
Respondent.	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of May, 2016, I caused a true and correct copy of the attached Petition for Review to be sent to the following by First Class United States mail, postage pre-paid:

William E. Slack	Shane D. Thurman
Counsel for the General Counsel	Compliance Officer

National Labor Relations Board
615 Chestnut Street
One Independence Mall, 7th Floor
Philadelphia, PA 19106-4404

Aaron Kisela
320 South Swarthmore Ave.
Apartment D3
Swarthmore, PA 19081

This statement is made subject to the penalties of 18 U.S.C. § 1621, relating to perjury.

Respectfully submitted,

HOLSTEN & ASSOCIATES

By: Mark Alan Raith
MARK ALAN RAITH, ESQUIRE

EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Boothwyn Fire Company No. 1 and Aaron Kisela.
Cases 04-CA-133498 and 04-CA-140365

May 16, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On April 15, 2015, Administrative Law Judge Robert A. Giannasi issued the attached decision. The General Counsel filed exceptions, the Respondent filed cross-exceptions,¹ and the General Counsel and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions, to amend the remedy, and to adopt the judge's recommended Order as modified and set forth in full below.³

¹ Although we rejected the Respondent's brief in support of its cross-exceptions because it was not timely filed, we have considered the Respondent's exceptions because they were accompanied by sufficient argument to satisfy the requirements of Sec. 102.46(b) of the Board's Rules and Regulations.

² The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that employee Kisela engaged in concerted activity, Member Miscimarra does not rely on *Alternative Energy Applications, Inc.*, 361 NLRB No. 139 (2014), or *Worldmark by Wyndham*, 356 NLRB 765 (2011), cited by the judge. Instead, Member Miscimarra would find that when Kisela joined employees Brees and Fabinger in raising the issue of pay increases to management, he acted with other employees and not solely by and on behalf of himself, see *Meyers Industries*, 268 NLRB 493, 496 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), and he also brought a group complaint to the attention of management, see *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), aff'd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

³ In accordance with our decision in *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order to reflect this remedial change, to conform to the Board's standard remedial language, and in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997) (holding that the contingent notice-mailing date in the order's notice-posting paragraph should correspond with the date of the first unfair labor practice). We shall substitute a new notice to conform to the Order as modified.

ORDER

The National Labor Relations Board orders that the Respondent, Boothwyn Fire Company No. 1, Boothwyn, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with retaliation if they engage in protected concerted activity regarding wage increases.

(b) Preparing written documentation against, discharging, or otherwise disciplining or discriminating against employees because they engage in protected concerted activity regarding wage increases.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Aaron Kisela full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Aaron Kisela whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Aaron Kisela for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files the unlawful verbal warning and incident documentations prepared against Aaron Kisela in June and July 2014, as well as all references to his unlawful discharge; and, within 3 days thereafter, notify him in writing that this has been done and that neither the verbal warning, documentations, nor the discharge will be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide, at a reasonable place designated by the Board or its agents, all payroll records, so-

The General Counsel excepts to the judge's failure to order that Kisela be reimbursed for his search-for-work and work-related expenses regardless of his interim earnings. Because the relief sought would involve a change in Board law, we decline to order this relief at this time.

cial security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Boothwyn, Pennsylvania facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 24, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 16, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with retaliation for engaging in protected concerted activity regarding wage increases.

WE WILL NOT prepare written documentations against, discharge, or otherwise discipline or discriminate against you for engaging in protected concerted activity regarding wage increases.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this order, offer Aaron Kisela full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Aaron Kisela whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Aaron Kisela for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of this order, remove from our files all unlawful verbal warning and incident documentations prepared against Aaron Kisela in June and July 2014, as well as all references to his unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that

BOOTHWYN FIRE COMPANY NO. 1

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neither the verbal warning, incident documentations, nor the discharge will be used against him in any way.

BOOTHWYN FIRE COMPANY NO. 1

The Board's decision can be found at www.nlr.gov/case/04-CA-133498 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



William B. Slack, Esq., for the General Counsel.
Mark Alan Raith, Esq. (Holsten & Associates), of Media, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on March 9, 2015. The complaint, as amended in one respect at the hearing (Tr. 94-95), alleges that Respondent violated Section 8(a)(1) of the Act by threatening employee Aaron Kisela with reprisals for joining in a protected concerted complaint about wages, and by thereafter issuing written disciplinary documentations to, and finally discharging, Kisela for such protected concerted activity. The Respondent filed an answer denying the essential allegations in the complaint.

After the trial, the General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record, including the testimony of the witnesses, and my observation of their demeanor, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Pennsylvania corporation with a facility in Boothwyn, Pennsylvania, is engaged in performing fire rescue, ambulance and related services. During a representative one-year period, Respondent purchased and received, at its facility described above, goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

¹ The General Counsel filed an unopposed motion to correct transcript as follows: At p. 83, line 1, the word "paragraph" should read "paragraph 3.". The motion is granted.

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

Background

As indicated above, Respondent provides ambulance, fire and emergency services in the Boothwyn and Upper Chichester Township areas. It employs a group of about 20-25 volunteer fire fighters as well as about 12 emergency medical technicians (EMTs). Some of the EMTs are paid and some are volunteers. In May 2014, Respondent added a group of about 10-14 paramedics to its staff as it expanded its operations to upgrade the medical services it provided directly. Previously, paramedic services were provided through a subcontract with Crozer Chester Medical Center, a local hospital. Paramedics perform some medical procedures that EMTs do not; for example, they may provide advance life support. At the time Respondent added the new paramedics, it also purchased a substantial amount of new equipment to accommodate the new service it provided.

The Respondent's supervisory hierarchy included Jason Heacock, who was Respondent's vice president and supervisor, as well as Timothy Murray, who was ambulance committee chair and head of the EMTs until May 2014. At that point, Michael Lynch took over Murray's responsibilities to supervise the EMTs and also undertook responsibility to supervise the paramedics. Lynch was designated EMS chief, and Murray acted as a liaison between Lynch and Respondent's board of directors.

Employee Aaron Kisela was a paid, part-time EMT who worked in that capacity from July 2009 until his discharge in July 2014. Although he was designated part time and also worked part time as an EMT for another nearby fire company, he worked some 40-60 hours a week for Respondent. Normally he worked 12-hour shifts, but he volunteered for and was given extra shifts. Kisela was a well-regarded employee with no previous disciplinary difficulties.²

On January 29, 2014, Kisela was given a very favorable evaluation by Supervisor Heacock, scoring 29 out of a possible 30 points. The categories evaluated included attendance and timeliness, dress/uniform, daily duties, skills, attitude, and charting. (GC Exh 2.)³

During the evaluation process, Heacock discussed with Kisela the possibility that he might be promoted to a supervisory position. Kisela also raised the issue of a pay raise for himself and another employee, Dwyne Wallace. Heacock mentioned that pay raises would be discussed in a future staff meet-

² Kisela candidly testified that he had received one warning early in his tenure of employment. But that was apparently not documented in a written form and Respondent's witnesses did not mention it in their testimony. Kisela's candor on this and other issues in this case was impressive. I found him a most reliable and credible witness, who survived sharp cross-examination by Respondent's attorney.

³ In an apparent attempt to downplay the significance of this positive evaluation, Heacock testified that he was mostly positive in all his evaluations at this time. But Respondent did not submit any other evaluations to support his testimony or to show that Kisela's evaluation was no more favorable than those of other employees. I therefore do not find Heacock's testimony in this respect reliable.

ing. Kisela thereafter discussed the possibility of pay raises and Heacock's statement about them with Wallace. (Tr. 15-17, 19.) Heacock confirmed in his testimony that several employees had approached him about pay raises, and that it was a matter of interest among the employees. (Tr. 113-114.)

The Staff Meeting of April 24

On April 10, 2014, Tim Murray sent an email to all EMTs announcing a staff meeting that would take place on April 24. The purpose of the meeting was described as covering "how we are moving forward with the ALS unit and the BLS unit and general overview of where things are going." (GC Exh. 3.) This was meant to announce the changes that involved the new paramedics' service and the new equipment related to that service, as well as to announce the new chief of both the paramedics and the EMTs, Michael Lynch. In fact, at the April 24, meeting, these announcements were made by Tim Murray. During the meeting, Murray was joined at the head of the room by Heacock and Lynch, who also spoke to the assembled employees.

At one point during the April 24 meeting, two employees, Dave Fabinger and Jim Brees raised the issue of pay raises for the EMTs. The issue was raised most vocally by Brees, who complained that Respondent was spending a lot of money to hire paramedics and to purchase new equipment, but not to give the EMTs raises. Murray answered Brees by asking, when was the last time he took a shift. Brees replied that Murray knew that he had conflicting needs. Murray also said that there was no money for raises at this time and that the issue might be discussed in the future, but not at this meeting. The exchange between Brees and Murray was somewhat heated. At some point, Kisela joined the discussion. He mentioned that he had taken many shifts, was promised pay raises and had not received them. Murray replied once again that Respondent did not have money for pay raises. At this point, Murray left the meeting. Thereafter, both Brees and Kisela continued to press the pay raise issue with Kisela repeating that Respondent had spent money to purchase new equipment and uniforms. Heacock responded, repeating that Respondent had no money for raises, but said maybe it would later. The meeting ended on that note when Lynch said that the issue had been exhausted.⁴

Shortly after the meeting concluded, while Kisela was outside with two other employees, Murray angrily approached Kisela and "yelled" at him. As the two other employees moved away, Murray accused Kisela of stabbing him in the back and asked him how he would like it if Murray reduced his hours. Murray also said he could send Kisela home and have him replaced.⁵

⁴ The above is based mostly on Kisela's testimony that was basically corroborated by Respondent's witnesses. Murray confirmed that, while he was in the meeting room, Kisela mentioned "the amount of hours he worked and felt he should get a raise as well as others." Tr. 88.

⁵ The above is based on a composite of Kisela's and Murray's testimony, which was essentially the same. Tr. 26-28, 91-93. This account was also corroborated by another witness, Patrick Adams, who was employed by Respondent when he testified. Adams described Murray as being "upset" that Kisela was "repeatedly bringing up the wage increases at the meeting." Tr. 81.

Murray testified that, after his confrontation with Kisela, he told Lynch about it. According to Murray, he did this because Lynch was now Kisela's "boss." (Tr. 93-94.) Lynch confirmed that Murray told him about the confrontation. (Tr. 153-154.)

On April 25, the day after the staff meeting, Brees resigned his position with Respondent. Also on that day, Fabinger, one of the other employees who mentioned pay raises at the April 24 meeting, but had to leave the meeting early, sent an email to other EMTs, with copies to Murray and Lynch. The email repeated some of the arguments made in favor of a pay raise that were made in the staff meeting, pointing out that no raises had been given to EMTs in 9 years and that the new paramedics were being paid almost twice the hourly rate paid to EMTs. Murray replied in another email that same day, copy to all EMTs and Lynch, stating that the matter was covered in the meeting and inviting employees to see him personally if they wanted to discuss the matter further. He also emphatically said that, "[w]e are NOT going to keep an email chain running." (GC Exh. 4.)

The Discharge of Kisela

Respondent discharged Kisela on July 10, 2014. He was notified of his discharge by Lynch, who told him only that his services were no longer needed and that he was not able to follow "the chain of command." Lynch did not elaborate even after Kisela kept pressing him for a reason for the discharge. (Tr. 33-36.)⁶

No written documentation was provided to Kisela explaining the reason for his discharge. The record does not show that Respondent has fired any other EMTs or paramedics, except for one in 2008. In that case, Respondent gave the employee a written reason for her discharge.⁷

⁶ Kisela's version of the discharge conversation, set forth above, was essentially corroborated by Lynch. Tr. 149. But I do not credit Lynch's testimony that his discharge decision was not motivated by Kisela's complaints about pay raises. I found Lynch to be a generally unreliable and evasive witness, with a truculent demeanor and a tendency to ramble in a most defensive manner. His testimony about consulting other officials before firing Kisela was contradicted by his pre-trial affidavit, and, when confronted with the inconsistency, he tried to avoid a direct answer. See Tr. 149-151. In addition, as I discuss elsewhere in this decision, Lynch's testimony about the written documents he inserted in Kisela's personnel file, never presenting Kisela with the documents, most without even telling him that those documents were being placed in his file, and often without getting his side of the story, reflect poorly on his asserted reasons for preparing the documentations. Indeed, Lynch's testimony about those documents reflects poorly on his credibility. Although he testified that he similarly wrote up other employees (Tr. 148-149, 152-153, 157), none of that documentation was provided by Respondent, either at the hearing or in response to the General Counsel's subpoena. See note 9 below. For all of these reasons, I cannot credit any of Lynch's testimony on the significant issues in this case.

⁷ In a position statement submitted by its attorney during the investigation of this case, Respondent stated that Kisela was the only EMT fired by Respondent in 2013 or 2014 "for any reason." GC Exh. 17. In response to the General Counsel's subpoena for documents showing the discharge of EMTs or paramedics since January 1, 2013, Respondent provided documents to support the discharge of one employee and that

The Respondent's Allegations of Misconduct by Kisela

Respondent, through EMS Chief Lynch, placed 5 written documents in Kisela's personnel file between June 3 and July 8, 2014. The first was titled a verbal warning documentation; the others were titled incident documentations. (GC Exhs. 5-9.)⁸ Kisela was not given copies of any of the documents, which recorded 5 incidents of alleged misconduct on his part. Except for the first one, Kisela did not even know such documents were being prepared and placed in his personnel file. The 5 documents involving Kisela are the only incident documentations and verbal warning documentations prepared by Respondent for EMTs or paramedics from January 2013 to the date of the hearing.⁹

The incidents referred to in the written documents involving Kisela are described below.

A June 3 verbal warning document describes a complaint from a volunteer fireman that Kisela had taken the chair he regularly used and hid it in another part of the firehouse. A video camera apparently recorded that Kisela indeed had hidden the chair. Pranks of this type were not uncommon. When Lynch initially heard about the prank, he did not consider it a "big deal" and told the person whose chair was hidden that he was not going to discipline Kisela for the incident. (Tr. 137.) But Lynch later told Kisela that his conduct was inappropriate; Kisela agreed and stated that he would not engage in such conduct in the future. But Lynch went further and prepared a written documentation of the incident, something that has never been done for someone engaging in a prank. Indeed Lynch made the following statement in the documentation, which was not transmitted to Kisela: "Should similar complaints come forward, Aaron will (sic) receiving further disciplinary actions up to and including termination of employment." (GC Exh. 5.)

On June 6, Lynch placed an incident documentation in Kisela's personnel file setting forth what he described as an example of rudeness to a student volunteer riding along with Kisela on one of his runs. The documentation is labeled a second warning. Lynch's documentation was apparently based on a report from the student, Kayla McGuire. Lynch did not provide a copy of the incident documentation to Kisela. Nor did he seek Kisela's side of the story, despite his statement in the document that he did speak to Kisela. (Tr. 40-42.) Lynch admitted in his testimony that he did not talk to Kisela about this matter. (Tr. 140.) This internal contradiction reflects poorly on Lynch's credibility. It is also clear from reading the document as an objective matter that Lynch was describing a one-sided story from the student. Lynch appeared to take great

pains in this document to exaggerate the alleged impropriety committed by Kisela. For example, he stated that there had been past incidents of rudeness to this student as well as rudeness to a patient, none of which was independently supported by other evidence or testimony.

Contrary to the incident documentation, I find that Kisela credibly testified that he did not treat McGuire with disrespect, nor did he belittle a patient. That testimony is uncontradicted. Respondent did not call McGuire as a witness, thus further undermining the credibility of Lynch's account of this incident and his documentation of it. Indeed, I find that Lynch's documentation of the incident was so flawed that it shows he was more intent on establishing a paper file to use against Kisela than in finding out what happened.

The next incident took place on June 12, 2014. According to Kisela's uncontradicted testimony, he was sitting in an office in the fire house taking a computer education class. Paramedic Laura Thomas came into the office and asked if Kisela had seen her paperwork, which she apparently misplaced after returning from an assignment. Kisela said he had not. Thomas apparently approached Lynch about her lost paperwork and Lynch later asked Kisela about the paperwork. Kisela told Lynch he had not seen Thomas' paperwork. Kisela also credibly testified that other people came in and out of the office while he was there. (Tr. 43-44, 69.)

Thomas did not testify, but Lynch did, basically corroborating Kisela's testimony about their conversation. However, Lynch testified, contrary to Kisela, that Kisela was the only person in the office so he assumed that Kisela was somehow responsible for doing something with Thomas' paperwork. I do not credit Lynch's testimony in this respect because he was not, unlike Kisela, in a position to know who else, if anyone, was in the room while Kisela was taking his computer course. Nor, without Thomas' testimony, can there be any finding that Thomas left her paperwork in the office or that other people could not have been responsible for taking or misplacing her paperwork. Indeed, on the present record, there is every reason to believe that she herself was responsible for her lost paperwork.

Nevertheless, and despite conceding that Kisela denied doing anything with Thomas' paperwork and that he had no proof of Kisela's responsibility for the missing paperwork (Tr. 142), Lynch prepared a written incident documentation on the matter, which he did not show Kisela or tell Kisela he was preparing. The document accused Kisela of "destroying" Thomas' paperwork. (GC Exh. 7.) The document also implied that he spoke to Kisela on this occasion about Kisela's need to improve his relationship with fellow employees, extolling at length on his alleged shortcomings in this respect. But that written narrative was not, even considering Lynch's testimony about his conversation with Kisela on this occasion, an accurate reflection of their conversation, thus further undermining Lynch's credibility. I therefore conclude that the written incident documentation was another example of Lynch's attempt to create a paper file against Kisela for reasons other than what actually happened, which was nothing. I find that Kisela had no responsibility at all for Thomas' lost documents. If anyone should have

was in 2008. And she was given a written letter documenting the reason for her discharge. Tr. 82-83, GC Exhs. 12 and 13.

⁸ The Respondent admitted that these written documentations amounted to a form of discipline. GC Exh. 1(g) and (h) (paragraph 5 of the complaint is admitted).

⁹ In response to the General Counsel's subpoena for the documents described above since January 1, 2013, Respondent produced only 2 such documents, both dated in 2007 and both signed by the employee given the documents. Tr. 82-83, GC Exhs. 12 and 14. I reject Lynch's testimony, unsupported by actual documents, that he prepared similar write-ups for other employees. See footnote 6 above.

been written up for losing documents, it should have been Thomas.

The next incident took place on June 19. Kisela arrived at Respondent's facility after a shift at his other EMT employment. According to Kisela, he and Laura Thomas decided to go to a Wawa, presumably to get coffee or a snack. According to Kisela, it was not unusual for employees to do personal errands or get food a "couple of miles away from the station." Tr. 46. Heacock confirmed that this was the case. (Tr. 112-113.) On the way to the Wawa, Kisela dropped off a pager he had to return to his other employment location. Thomas made no objection to the detour from Wawa to return the pager, and, as indicated above, she did not testify in this proceeding. Kisela heard nothing more about the matter from Thomas, Lynch or anyone else. (Tr. 46-47.)¹⁰

But, once again, Lynch prepared a written incident documentation on the matter, which was not presented to Kisela. The written documentation accused Kisela of "rudeness." (GC Exh. 8.) As in a previous documentation, Lynch made it appear that he talked to Kisela about this incident. But he clearly did not, as he admitted when I questioned him about it. Indeed, when presented with the apparent inconsistency, he backtracked and insisted he had talked to Kisela about similar matters on other occasions. (Tr. 159-163.) Here again, I find Lynch's testimony on the matter reflects adversely on his credibility as a witness. I also find that Lynch's documentation of this incident was another attempt to create a paper file to use against Kisela, particularly since there is no evidence that Respondent had any rules against side-trips during a tour of duty or that it disciplined other employees for doing so.

The final incident that resulted in an incident documentation, took place on July 8, 2 days before Kisela was discharged. Kisela was on an ambulance run with Laura Thomas answering a call about injuries in an automobile accident. What follows is Kisela's uncontradicted and credible account of what happened because, here again, Thomas did not testify. As Kisela and Thomas exited their ambulance, they were directed to a woman who was sitting on a curb. She was involved in the accident and had a golf-ball sized hematoma on the side of her head. It was swelling and a little discolored. (Tr. 48.) Thomas, who was the senior medical officer, attended the patient, who stated she did not want to go to a hospital. Thomas then turned to Kisela and said, "[s]he's all yours." (Tr. 49.) Kisela understood that to mean that he should secure from the patient a signed refusal form. (Tr. 49-50.) It is the normal practice for emergency responders to suggest that injured patients go to a hospital emergency room, but they cannot force a patient to go. Then responders get the patient to sign a refusal form in accordance with government sanctioned protocols. (Tr. 85-87.)

Those government protocols require that emergency responders take certain steps before securing patient refusals. The EMT protocol provides a checklist that requires checking boxes if there is evidence of a certain type of injury, one of which is a head injury. If any of the boxes are checked, the

responder is directed to contact "medical command," meaning a medical doctor. A similar protocol for paramedics urges the responder to contact "medical command" when "in doubt." (GC Exhs. 15 and 16.)

Kisela assisted the patient into the ambulance and began filling out the refusal form. As directed by the form and the required protocols, he asked the patient questions about the accident and her injuries. He then came to the point on the form titled, "medical command." Before filling in an answer, and following the applicable protocol, Kisela called a doctor at Crozer-Chester Medical Center and reached a Dr. Kitchner. (Tr. 51-52.) Dr. Kitchner asked whether there was a paramedic on the scene and Kisela said there was, but the patient had been turned over to him. (Tr. 55.) Dr. Kitchner then asked to talk to the patient. After that conversation was completed, the patient turned the phone back to Kisela, who talked to the doctor. They agreed that the patient should go to an emergency room, but, if she wanted to go to her own doctor, that was her decision. Kisela then completed the rest of the form, had the patient sign it, and he himself signed it. (Tr. 52-54.)

At some point during Kisela's assessment of the patient in the ambulance, Thomas, who had been elsewhere at the accident scene, opened the side entrance of the ambulance and asked why Kisela was calling medical command. Before Kisela could answer, Thomas slammed the door and left. (Tr. 53-54.) After the patient was released and Thomas joined Kisela in the ambulance to return to the fire house, Thomas remarked to Kisela, "[n]ow, don't throw me under the bus for this one." Kisela replied that he was going to put "exactly what happened" in his report or chart. (Tr. 55.) That report or chart prepared by Kisela was turned over to Respondent, as is the normal practice. (Tr. 55-56, GC Exh. 11.)

In the 2 days between the above incident and Kisela's discharge, Lynch never talked to Kisela about the incident. (Tr. 56, 158.) But he prepared an incident documentation, erroneously dated July 7,¹¹ and apparently relying solely on Thomas's account of what happened, that accused Kisela of insubordination and violation of company policies. It is clear from the incident documentation that Lynch also did not talk to Dr. Kitchner or the patient. Thus, the documentation does not accurately reflect what actually happened, as shown by the factual findings set forth above. The documentation also mentions "chain of command" in the context of the accusation that Kisela chose "to supersede the authority of Ms. Thomas." But it is clear from Kisela's credible, uncontradicted testimony that he did not disobey an order from Thomas. She did not, for example, order Kisela not to contact medical command. (Tr. 47-49, 73.) Nor does the documentation cite any specific company policy that was violated. And none was presented at the hearing, other than the government required protocols mentioned above, which Kisela dutifully followed. The documentation also states that Lynch discussed the matter with other members of Respondent's management and that a decision was made to discharge Kisela. (GC Exh. 9.)

¹⁰ The above is based on Kisela's credible and uncontradicted testimony about the incident. As indicated, Thomas did not testify in this proceeding.

¹¹ Kisela's report or chart (GC Exh. 11) clearly states that the incident took place on July 8.

Discussion and Analysis

Kisela Engaged in Protected Concerted Activity

As shown in the factual statement, Kisela joined fellow employees in complaining about wages during the April 24 meeting with management officials. Such complaints about wages clearly involve group concerns and deal with matters protected by Section 7 of the Act. See *Whittaker Corp.*, 289 NLRB 933, 934 (1988); and *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. 4, fn. 10 (2014) (wage discussions are “inherently concerted” even if they are not engaged in with the “express object of inducing group action.”). Even though it appears that the issue of wage increases was a concern among employees prior to the April 24 meeting, the spontaneous nature of the protest during the meeting does not diminish its protected status. There is no need for employees to agree in advance to join together in a group protest. See *Worldmark by Wyndam*, 356 NLRB 765, 767 (2011). The protests also did not lose their protected status because they were made, as here, at a meeting, whose purpose was something other than wage discussions. See *Air Contact Transport, Inc.*, 340 NLRB 688, 695 (2003), *enfd.* 403 F.3d 206 (4th Cir. 2005). Finally, contrary to Respondent’s contention (R. Br. 8–9, 12) an otherwise concerted action is not rendered unprotected simply because it includes a selfish interest. See *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. 4–6 (2014).

Nor do Kisela’s remarks about wage increases lose their protected status because they included a reference to his working extra shifts or long hours. The hours worked issue was inescapably intertwined with the pay raise discussion. Even before Kisela joined the discussion, Murray responded to Brees’ plea for pay raises by sarcastically asking when was the last time Brees took a shift, thus injecting the issue of hours worked into the pay raise discussion. Kisela’s reference to his hours was simply a demonstration of why he and others deserved a pay raise. Murray’s own testimony confirms this connection. He testified that, during the meeting, Kisela mentioned “the amount of hours he worked and felt he should get a raise as well as others.” (Tr. 88.)

The Threats Against Kisela

There is no serious dispute that, immediately following the April 24 meeting, Murray angrily confronted Kisela, told him he had stabbed Murray in the back, and threatened to cut Kisela hours and send him home and replace him. These statements were obviously in response to Kisela’s efforts, in the meeting, to make common cause with fellow employees who were urging pay raises for EMTs, which was, as shown above, a protected concerted activity. Indeed, an independent employee witness described Murray’s remarks on this occasion as a reaction to Kisela’s “repeatedly bringing up the wage increases at the meeting.” (Tr. 81.) Although Murray attempted to explain his statements as a response to a perceived attack on him because he had accommodated Kisela’s desire for more hours, it is clear that, in context, Murray’s remarks threatened retaliation that had the tendency to stifle employee efforts to obtain pay raises. It is well settled that coercive and threatening statements are measured not by the subjective views of either the

speaker or the listener, but by whether the remarks had the reasonable tendency to interfere with the free exercise of Section 7 rights. See *NLRB v. Illinois Tool Works*, 153 F.2d 811, 816 (7th Cir. 1946). In these circumstances, Murray’s remarks were clearly coercive, and Respondent thus violated Section 8(a)(1) of the Act. See *Ellison Media Co.*, 344 NLRB 1112, 1113 (2005); *George L. Mee Memorial Hospital*, 348 NLRB 327 (2006); *Armstrong Machine Co.*, 343 NLRB 1149, 1151 (2004).¹²

The Written Documentations and Discharge of Kisela

In determining whether an employer’s discipline or discharge is unlawful, the Board applies the mixed motive analysis as set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee’s protected activity was a motivating factor in an employer’s adverse action. If the General Counsel meets that initial burden, the burden shifts to the employer to show it would have taken the same action even absent the employee’s protected activity. The employer does not meet its burden merely by showing it had a legitimate reason for the action; it must demonstrate that it would have taken the same action in the absence of the protected conduct. And if the employer’s proffered reasons are pretextual—either false or not actually relied on—the employer fails by definition to meet its burden of showing it would have taken the same action for those reasons, absent the protected activity. See *Alternative Energy Applications*, cited above, 361 NLRB No. 139, at slip op. 3, citing authorities.

Indeed, it has long been recognized that where an employer’s reasons are false, it can be inferred “that the [real] motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Finally, a trier of fact may not only reject a witness’ story, but also find that the truth is the opposite of that story. *Pratt (Corrugated Logistics), LLC*, 360 NLRB No. 48, slip op. 11–12 (2014), and cases there cited.

Applying the above principles to the facts in this case, I find that the General Counsel has established that the Respondent issued several warnings or incident reports against Kisela and later discharged him for joining fellow employees in pressing for raises for the EMTs, a protected concerted activity. The reasons offered by Respondent for these actions were pretexts and the management official who prepared these warnings and reports and who discharged Kisela, Michael Lynch, was not a credible witness, as I have set forth at various points in the

¹² It seems appropriate here to quote from Judge Learned Hand in *NLRB v. Federbush Co., Inc.*, 121 F.2d 954, 957 (2nd Cir. 1941):

Words are not pebbles in alien juxtaposition; they each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination that it is not safe to thwart.

factual presentation of this decision. I therefore reject his testimony that Kisela's protected activity did not enter into his personnel decisions and I believe the opposite of his story, that is, that he discriminated against Kisela for his protected activity.

The General Counsel has easily met the initial burden of showing that the written documentations and the discharge of Kisela were motivated by his making common cause with his fellow employees in pressing management for a pay raise in the April 24 meeting. The Respondent's hostility to any group discussion of pay raises is confirmed by Murray's response to an email string attempting to keep the pay raise issue alive the day after the meeting. He precipitously stopped the email discussion and directed all future inquiries to be made on an individual, not a collective, basis. Significantly, immediately after the April 24 meeting, Murray angrily confronted Kisela and threatened him with retaliation for his wage protests. Murray discussed this confrontation with Lynch, who thereafter placed written documentations in Kisela's personnel file. As I have indicated, those documentations were pretextual and thus further support the initial showing of discrimination. In most cases, the documentations failed to accurately reflect what had happened in the incidents that were recorded; and Kisela was not even shown the documentations or told that they were being prepared. These documentations were unusual and contrary to past practice. Respondent only provided two such written documentations in response to a subpoena from the General Counsel. And those were some 7 years old and both signed by the employee, unlike the documents against Kisela. More importantly, in most cases, Lynch, who prepared the documents, did not even secure Kisela's side of the story. Such failure to engage in a full investigation of alleged incidents of misconduct is a recognized indicia of pretext. See *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1004-1105 (2004), *enfd.* 198 Fed. Appx. 752 (10th Cir. 2006).

The unlawful documentations, particularly the last one, led to Kisela's discharge. The discharge itself was unusual because it appears to be only the second such discharge in the past 6 years. And unlike that discharge, here, Kisela was not given a written documentation of the reason for his discharge. Moreover, the discharge was based on an incident that Respondent did not adequately investigate. Indeed, uncontradicted testimony shows that Kisela did not engage in insubordination or failure to follow the chain of command, the reason given by Respondent for his discharge. Kisela followed the paramedic's instruction to take over the patient for the purposes of preparing a refusal form. He also followed the applicable protocols for notifying medical command before obtaining a refusal from the patient to have medical treatment. Even when in doubt about the condition of a patient and his or her refusal to accept medical services, emergency responders are advised, surely out of an abundance of caution, to contact medical command. Sadly, Lynch's explanation that medical command should not have been contacted suggests that Respondent was less interested in ensuring that all precautions are taken for the health of patients during emergencies than in finding a pretext to fire an employee. More pertinent to this case, the pretextual explanation buttresses my finding of discrimination.

In these circumstances, it is clear that the documentations and the discharge of Kisela were motivated by his participation in protected concerted activities. And since Respondent's explanations were pretexts, it is also clear that Respondent's reasons for its actions were not sufficient to overcome the evidence that they were discriminatorily motivated. Respondent has failed to show that it would have taken the same actions in the absence of Kisela's protected concerted activity. Thus, in its treatment of Kisela, Respondent has violated Section 8(a)(1) of the Act.¹³

CONCLUSIONS OF LAW

1. By threatening employee Aaron Kisela with retaliation, preparing verbal warning and incident documentations against him in June and July 2013, and by discharging him on July 10, 2014, all for engaging in protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

2. The above violations constitute unfair labor practices within the meaning of the Act.

REMEDY

Having found that Respondent committed unfair labor practices within the meaning of the Act, I shall order it to cease and desist from such conduct and take certain affirmative action designed to effectuate the purposes of the Act. Having found that Respondent unlawfully prepared written documentations against employee Aaron Kisela, I shall order it to remove and expunge all such documentations from his personnel file. Having found that Respondent also unlawfully discharged Kisela, I shall order it to offer him full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, Respondent must compensate Kisela for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). Respondent will also be ordered to remove from its files all the unlawful written docu-

¹³ Respondent makes much of the fact that employee Fabinger, who also spoke in favor of a pay raise in the April 24 meeting, was not confronted, disciplined, or discharged, as was Kisela (R. Br. 10-11). But Fabinger left the meeting early and was thus unavailable for a postmeeting confrontation; and his subsequent email repeating concerns about a pay raise was met with some amount of disdain by Murray. In any event, an employer cannot escape a finding of discrimination simply because it did not similarly discriminate against other employees engaged in similar protected activity. As one court has observed, "it is well established that a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all [those engaged in the protected activity]." *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964).

mentations issued to Kisela in June and July 2014, as well as any references to his unlawful discharge, and to notify him in writing that this has been done and that those unlawful written documentations and the unlawful discharge will not be used against him in any way.¹⁴

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended¹⁵

ORDER

Respondent, Boothwyn Fire Company No. 1, Boothwyn, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with retaliation for joining with other employees in discussing wage increases.

(b) Preparing written documentations against, discharging or otherwise disciplining or discriminating against, employees for joining with other employees in discussing wage increases.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this order, offer Aaron Kisela full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Aaron Kisela whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Compensate Aaron Kisela for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this order, remove from its files all unlawful verbal warning and incident documentations prepared against Aaron Kisela in June and July 2014, as well as all references to his unlawful discharge; and, within 3 days thereafter, notify him that this had been done and that the documentations and the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause

¹⁴ Counsel for the General Counsel requests (brief 37-40) that the order in this case should include a requirement that Kisela be reimbursed for search-for-work and work-related expenses, without regard to whether interim earnings are in excess of these expenses. Normally, those expenses are considered an offset to interim earnings. But the General Counsel seeks a change in existing rules regarding search-for-work and work-related expenses. This would require a change in Board law, which is solely in the province of the Board and not an administrative law judge. Therefore, I shall not include this remedial proposal in my recommended order.

¹⁵ If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

shown, provide, at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(f) Within 14 days after service by the Region, post at its Boothwyn, Pennsylvania facility, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 28, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 15, 2015

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with retaliation for joining with other employees in discussing wage increases.

WE WILL NOT prepare written documentations against, discharge or otherwise discipline or discriminate against, employ-

¹⁶ If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ees for joining with other employees in discussing wage increases.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of this order, offer Aaron Kisela full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Aaron Kisela whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, with interest.

WE WILL compensate Aaron Kisela for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this order, remove from our files all unlawful verbal warning and incident documentations prepared against Aaron Kisela in June and July 2014, as well as all references to his unlawful discharge; and, within 3 days thereafter, notify him that this has been done and

that the documentations and the discharge will not be used against him in any way.

BOOTHWYN FIRE COMPANY No. 1

The Administrative Law Judge's decision can be found at www.nlr.gov/case/04-CA-133498 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

